

be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.

(Sec. 38(a) (15 U.S.C. 80a-37(a)); sec. 19(a) (15 U.S.C. 77s(a)); secs. 10(b) and 23(a) (15 U.S.C. 78j(b) and 78w(a)))

[44 FR 64072, Nov. 6, 1979]

§ 230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 *et seq.*), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term *small business* or *small organization* shall:

(a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, mean an issuer whose total assets on the last day of its most recent fiscal year were \$5 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b) of the Securities Act.

(b) When used with reference to an investment company that is an issuer for purposes of the Act, have the meaning ascribed to those terms by § 270.0-10 of this chapter.

[47 FR 5221, Feb. 4, 1982, as amended at 51 FR 25362, July 14, 1986; 63 FR 35514, June 30, 1998]

§ 230.158 Definitions of certain terms in the last paragraph of section 11(a).

(a) An "earning statement" made generally available to securityholders of the registrant pursuant to the last paragraph of section 11(a) of the Act shall be sufficient for the purposes of such paragraph if:

(1) There is included the information required for statements of income contained either:

(i) In Item 8 of Form 10-K and Form 10-KSB (§ 249.310 of this chapter), part I, Item 1 of Form 10-Q and Form 10-QSB

(§ 249.308a of this chapter), or rule 14a-3(b) (§ 240.14a-3(b) of this chapter) under the Securities Exchange Act of 1934;

(ii) In Item 17 of Form 20-F (§ 249.220f of this chapter), if appropriate; or

(iii) In Form 40-F (§ 249.240f of this chapter); and

(2) The information specified in the last paragraph of section 11(a) is contained in one report or any combination of reports either:

(i) On Form 10-K and Form 10-KSB, Form 10-Q and Form 10-QSB, Form 8-K (§ 249.308 of this chapter), or in the annual report to securityholders pursuant to rule 14a-3 under the Securities Exchange Act of 1934; or

(ii) On Form 20-F, Form 40-F or Form 6-K (§ 249.306 of this chapter).

A subsidiary issuing debt securities guaranteed by its parent will be deemed to have met the requirements of this paragraph if the parent's income statements satisfy the criteria of this paragraph and information respecting the subsidiary is included to the same extent as was presented in the registration statement. An "earning statement" not meeting the requirements of this paragraph may otherwise be sufficient for purposes of the last paragraph of section 11(a).

(b) For purposes of the last paragraph of section 11(a) only, the "earning statement" contemplated by paragraph (a) of this section shall be deemed to be "made generally available to its securityholders" if the registrant:

(1) Is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and

(2) Has filed its report or reports on Form 10-K and Form 10-KSB, Form 10-Q and Form 10-QSB, Form 8-K, Form 20-F, Form 40-F, or Form 6-K, or has supplied to the Commission copies of the annual report sent to securityholders pursuant to rule 14a-3(c), containing such information.

A registrant may use other methods to make an earning statement "generally available to its securityholders" for purposes of the last paragraph of section 11(a).

(c) For purposes of the last paragraph of section 11(a) only, the *effective date of the registration statement* is deemed to be the date of the latest to occur of (1) the effective date of the registration

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statement: (2) the effective date of the last post-effective amendment to the registration statement, next preceding a particular sale by the registrant of registered securities to the public filed for purposes of (i) including any prospectus required by section 10(a)(3) of the Act, (ii) reflecting in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement, or (iii) including any material information with respect to the plan or distribution not previously disclosed in this registration statement or any material change to such information in the registration statement, or (3) the date of filing of the last report of the registrant incorporated by reference into the prospectus, and relied upon in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2) (i) and (ii) of this rule, next preceding a particular sale by the registrant of registered securities to the public.

(d) If an earnings statement was made available by "other methods" than those specified in paragraphs (a) and (b) of this section, the earnings statement must be filed as exhibit 99 to the next periodic report required by section 13 or 15(d) of the Exchange Act covering the period in which the earnings statement was released.

[48 FR 44770, Sept. 30, 1983, as amended at 56 FR 30054, July 1, 1991; 58 FR 14669, Mar. 18, 1993]

§ 230.160. Registered investment company exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

A prospectus for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) that is sent or given for the sole purpose of permitting a communication not to be deemed a prospectus under section 2(a)(10)(a) of the Act (15 U.S.C. 77b(a)(10)(a)) shall be exempt from the requirements of section

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101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

[65 FR 47284, Aug. 2, 2000]

§ 230.161 Amendments to rules and regulations governing exemptions.

The rules and regulations governing the exemption of securities under section 3(b) of the Act, as in effect at the time the securities are first bona fide offered to the public in conformity therewith, shall continue to govern the exemption of such securities notwithstanding the subsequent amendment of such rules and regulations. This section shall not apply, however, to any new offering of such securities by an issuer or underwriter after the effective date of any such amendment, nor shall it apply to any offering after January 1, 1959, of securities by an issuer or underwriter pursuant to Regulation D or pursuant to Regulation A as in effect at any time prior to July 23, 1956.

[23 FR 4454, June 20, 1958]

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), offerors may solicit tenders of securities in an exchange offer subject to § 240.13e-4(e) or § 240.14d-4(b) of this chapter before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules.

(b) Notwithstanding section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer subject to § 240.13e-4(e) or § 240.14d-4(b) of this chapter, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e-4(e)(2) or § 240.14d-4(b) of this chapter, as applicable.

[64 FR 61450, Nov. 10, 1999]